(24)

No. 624

Office - Supreme Court, U. S.
FILED
MAR 23 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943

CAPE ANN GRANITE COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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A number of inaccuracies appearing in the brief filed in opposition by the United States and other features therein require attention. These will be referred to page by page as the most convenient method.

Page 2. The Change Order did not "stipulate that it in no way affected the completion date originally fixed". The Change Order merely pointed out that the new work on the mounds did not exceed the amount of work called for in the original contract (R. 17). The language used is:

> "The change in the size and form of the mounds will not increase the difficulty of placing the stone, *hence* it is understood and agreed

> that on account of the foregoing modification of said contract no additional time will be allowed [additional to what?] nor any change made in the unit price as stated in the contract." (Italics supplied.)

The Government seems to take the arbitrary stand that work should have been completed before March 5, 1937, that was not even specified until September 22, 1937, more than six months later.

Under "Question 3," the payment made by the Government in January, 1938, after the completion of the work on December 22, 1937, was *not* final payment by the Government, since a later payment was made by the General Accounting Office in August, 1939, *after* the Secretary of War had refused to consider the appeal as the contract required (*cf.* Government brief, page 5).

Page 7. The statement at the bottom of this page and at the top of the next page:

> "The Government had made a scientific study of current velocity under various tidal conditions and over the full tidal cycle and the average stated in the specifications was the result of that study."

is quite incorrect.

The finding of 2.08 miles per hour was made in November, 1937 (PR. 163).* But the Specifications were drawn in the Summer of 1935 *before* bids were invited. Therefore, the average stated in the Specifications *could not* have been "the result of that study". The petitioner has pointed out (Pet. 24) that the study did *not* include *the full tidal cycle* but only a period of but 3.75 hours out of 7.5 hours of three *ebb* tides only,

* PR. refers to the unprinted record designated by the petitioner.

and that the "study" was made to ascertain current *direction* only. A scientific study of *velocity* would have required many more observations with different equipment.

Page 9. The flood of March, 1936,—before work commenced, in April—so changed subsurface and latent conditions that the Government itself withdrew the soundings on Charts Nos. 331 and 1206 (Pet. 18).

The purported quotation from Article 4 of the Contract omits and substitutes arterisks for the phrase particularly pertinent to this case, viz.: *"or the Government discover"*. The petitioner contends that the Government first discovered changes in subsurface and latent conditions and published official notices thereof (Pet. 17-18). Under the contract no duty devolved upon the Contractor to refer the Government to its own discovery made by the office of the contracting officer.

Page 10. The statement in the Government's brief that:

> "* * * and not until a year and a half later were such changes cited by petitioner as justifying the delays in the completion of the contract."

is misleading because it appears by the uncontradicted statement in Exhibit 64 (PR. 123) that oral notifications thereof had been given "from time to time" to the Contracting Officer on prior occasions.

The note at the bottom of page 10 in which the statement is made:

> "* * * but the shallowest depth of the channel through the bar had merely changed from 10 feet prior to the flood to 9.5 feet",

is based solely upon the very findings of the Contracting Officer (PR. 157) which are challenged in this petition and which are not supported in the Record by any other evidence. The Government produced no chart or record to contradict the soundings shown on revised Chart No. 331 (Exhibit 90, PR. 160) which directly contradict the quoted statement.

Page 11. The statement at the top of this page that:

> "* * * the evidence shows that the sand bar was constantly shifting in extent and depth, the channel through it being equally inconstant, and careful mariners had already taken soundings prior to crossing it."

is correct, but this knowledge *was not brought home,* directly or inferentially, to the president of the petitioner who prepared the bid. These facts are contrary to the representation in Par. 7 of the Specifications.

Page 12. The tabulation of prior weather reports relied upon by the Government is part of the basis for the petitioner's complaint. These tabulations were made without any opportunity to petitioner to attack their accuracy or materiality before the Contracting Officer or to cross-examine any witnesses.

Page 13. The *Kihlberg* and *Callahan* cases are not in point for the reason, among others, that the Quartermaster and the Contracting Officer, respectively, had no personal short-coming to cover up as Col. Lyman had here.

The lower Court had no evidentiary basis upon which to determine "independently" relative weather conditions other than the findings of the Contracting Officer under attack.

Page 14. The Government fails to appreciate that the condition of the weather alone was not the exclusive cause for delay, but rather the weather *combined* with the excessive current. The combination of even *normally* severe weather and the excessive and *unforeseeable* current produced an unforeseeable result that required adjustment under the contract.

Page 15. The statement in the Government's brief:

> "The commissioner of the Court of Claims who took the evidence *and heard the witnesses* found that the Change Order did not hinder or delay petitioner in the completion of the contract, except insofar as the latter may have withheld at its own election the placing of stone on the mounds (C. Cls. Rec. 42)." (Italics supplied.)

is contrary to the record since *all* the testimony was taken by Commissioners Church and Gordon, but the Report of Commissioner was made by Commissioner *Evans* (Pet. 8) who heard none of the witnesses.

Page 16. (Note 8) The Government overlooks the fact that the lower Court has held that the Government breached the contract. Therefore, no part of the breached contract can be available to the Government as a consideration for the Change Order.

Page 18. The breach by the Government was not "of an incidental and subordinate part of the contract," since it went to the root of Articles 4, 9 and 15 of the contract which provided the protection afforded the Contractor against requirements of performance beyond the boundaries of its bid.

Page 19. (Note) The rescission of the contract was made promptly after the breach of the contract by the Secretary of War who, up to that time, had it within his power to rectify the prior breaches of contract by the Contracting Officer.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

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March 22, 1944.